

**James R. Silkenat**  
President

AMERICAN BAR ASSOCIATION

321 North Clark Street  
Chicago, IL 60654-7598  
(312) 988-5109  
FAX: (312) 988-5100  
abapresident@americanbar.org

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The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

**Re: Withdrawal of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)**

Dear Attorney General Holder:

On behalf of the American Bar Association (ABA), I write to express our continuing concerns about the adverse effects of former Attorney General Mukasey's opinion in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), and once again to urge you to withdraw this ill-reasoned and pernicious opinion.<sup>1</sup>

As you know, last month the U.S. Court of Appeals for the Fifth Circuit rejected the former Attorney General's *Matter of Silva-Trevino* opinion in the *Silva-Trevino* case itself. *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014). The Fifth Circuit thus became the fifth federal court of appeals to reject the former Attorney General's opinion and conclude that the Immigration and Nationality Act (INA) unambiguously forbids fact-finding beyond the record of conviction to determine if an immigrant is removable based upon a "conviction" for a crime involving moral turpitude. The court correctly concluded that *Matter of Silva-Trevino* is inconsistent with the "widespread continuous use" of categorical analysis in immigration law, which has persisted at least a century.<sup>2</sup> *Silva-Trevino*, 742 F.3d at 202.

Now that the *Silva-Trevino* case itself has been remanded to the Board of Immigration Appeals (BIA) for further proceedings, and in light of recent Supreme Court precedent re-affirming the categorical approach in criminal and immigration law, the time is appropriate to withdraw *Matter of Silva-Trevino* and restore fairness, uniformity and predictability to determining the immigration consequences of criminal convictions.

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<sup>1</sup> See Letter from Carolyn B. Lamm, President, American Bar Association, to Attorney General Eric Holder (Jan. 22, 2010) (urging withdrawal of *Matter of Silva-Trevino*) (attached).

<sup>2</sup> See *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (noting the categorical approach's "long pedigree," and citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011))

**Matter of Silva-Trevino undermines the fair administration of justice in criminal and immigration law.**

The American Bar Association has long advocated that due process requires a system for administering our immigration laws that is transparent, fair, and efficient. The former Attorney General's decision in *Matter of Silva-Trevino* upended a century of precedent applying categorical analysis of convictions in immigration cases, including convictions for "crimes involving moral turpitude." Allowing immigration adjudicators to determine the nature of a conviction by investigating facts that were never a necessary part of the criminal proceeding forces noncitizens to re-litigate their criminal cases, which raises serious issues of procedural due process and fairness.

This factual inquiry can occur years or decades after the original conviction, when evidence is gone and memories have faded, making the inquiry particularly unreliable. Immigration judges may rely on documents, such as police reports or unsworn statements generated early in a criminal case, on which the prosecution itself may never have relied. This inquiry occurs without the rules of evidence or constitutional protections that govern the criminal case. It can take place when noncitizens are unrepresented by counsel and detained thousands of miles from their homes and the place where the conviction occurred, making it effectively impossible to gather evidence or witnesses. Moreover, *Matter of Silva-Trevino* has binding effect not just in immigration court but in U.S. Citizenship and Immigration Service adjudications, where noncitizens have even fewer procedural protections, and where they may be given no notice before this framework is applied to deny them permanent residence, citizenship, or benefits available for protections for victims of abuse and trafficking.

In addition, the predictability provided by the categorical approach, where noncitizens convicted under identical provisions of law face the same immigration consequences, is essential to the operation of the criminal courts. As criminal defense lawyers attempt to responsibly comply with the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and advise clients of the immigration consequences of potential plea agreements, *Matter of Silva-Trevino* makes giving informed and reliable advice near-impossible because defense lawyers and clients cannot predict how immigration judges will conduct a fact-specific inquiry into those convictions in the future. Furthermore, applying *Matter of Silva-Trevino* retroactively to pleas that were entered into in reliance on the longstanding categorical approach is fundamentally unfair and disruptive to the expectations of the defendants and courts that agreed to and approved those pleas.

**Since Matter of Silva-Trevino was issued, the Supreme Court and federal courts of appeals have re-affirmed the central role of the categorical approach in criminal and immigration law.**

The Fifth Circuit is the fifth federal appeals court to reject *Matter of Silva-Trevino* as contrary to the plain language of the INA's conviction-based grounds of removability. *Silva-Trevino*, 742 F.3d at 200; *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009). These courts have consistently noted the long-standing application of the categorical approach in immigration law and held that INA's requirement of a "conviction" unambiguously restricts the moral turpitude inquiry to the statute of conviction, and in

some cases, the record of conviction. *See Silva-Trevino*, 742 F.3d at 202 (“It seems that Congress would have given some indication if it wanted adjudicators to ‘abandon’ the longstanding categorical approach in favor of an ‘elaborate fact finding process’”) (quoting *Taylor v. U.S.*, 495 U.S. 575, 601 (1990)); *see also Olivas-Motta*, 716 F.3d at 1204 (rejecting the Attorney General’s “new, and erroneous, definition of ‘convicted of’”); *Prudencio*, 669 F.3d at 482 (same); *Fajardo*, 659 F.3d at 1309 (same); *Jean-Louis*, 582 F.3d at 474 (same).

The two courts of appeals that have upheld *Matter of Silva-Trevino* did so not because they agreed that the INA *requires* a factual inquiry into a conviction to determine whether it constitutes a “crime involving moral turpitude,” but instead, because they gave *Chevron* deference to the prior Attorney General’s new interpretation of the statute. *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012); *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008). If *Matter of Silva-Trevino* were withdrawn, those courts would presumably grant the same deference to your action restoring the previous state of the law, resulting in the national uniformity desired in the first place. *See generally National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005). In fact, the Fifth Circuit noted that prior to the issuance of *Matter of Silva-Trevino*, there was “broad consensus among the federal courts that the ‘convicted of’ language precludes consideration of evidence beyond the conviction record.” *Silva-Trevino*, 742 F.3d at 205. Your withdrawal of the former Attorney General’s opinion would simply restore the categorical approach adopted and applied by immigration adjudicators for nearly a century prior to that opinion.

The Supreme Court’s recent decisions in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), also strongly reaffirm the importance of the categorical approach. In *Moncrieffe*, the Court stated expressly that fact-based inquiries into conviction-based grounds of removal are “entirely inconsistent with both the INA’s text and the categorical approach,” and noted the serious fairness concerns inherent to re-litigation of long-ago convictions. 133 S.Ct. at 1690-91.

Because of these clear statements of law as to the central role of the categorical approach, and the ongoing due process concerns raised by the methodology in *Matter of Silva-Trevino*, we urge you to follow the lead of the Fifth Circuit’s remand of, and the four other circuit courts’ rejection of, *Silva-Trevino* and to withdraw the former Attorney General’s opinion. Such an action would correct a decision that has impaired the fair administration of justice in the immigration courts and agencies for almost six years and would restore uniformity, predictability, and fairness to this important area of the law.

Thank you for your time and consideration.

Respectfully,



James R. Silkenat

CC: Stuart F. Delery, Assistant Attorney General  
Juan P. Osuna, Director, Executive Office of Immigration Review